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SERIAL NUMBER	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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08/135,046 10/12/93 GARVIN

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EXAMINER

CRANE, D

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02M1/0905

ART UNIT

PAPER NUMBER

8

3201

DATE MAILED: 09/05/95

This is a communication from the examiner in charge of your application.  
COMMISSIONER OF PATENTS AND TRADEMARKS This application has been examined  Responsive to communication filed on \_\_\_\_\_  This action is made final.A shortened statutory period for response to this action is set to expire THREE month(s), \_\_\_\_\_ days from the date of this letter.  
Failure to respond within the period for response will cause the application to become abandoned. 35 U.S.C. 133**Part I THE FOLLOWING ATTACHMENT(S) ARE PART OF THIS ACTION:**

1.  Notice of References Cited by Examiner, PTO-892.
2.  Notice of Draftsman's Patent Drawing Review, PTO-948.
3.  Notice of Art Cited by Applicant, PTO-1449.
4.  Notice of Informal Patent Application, PTO-152.
5.  Information on How to Effect Drawing Changes, PTO-1474.
6.  \_\_\_\_\_

**Part II SUMMARY OF ACTION**1.  Claims 1-6, 9 are pending in the application.

Of the above, claims \_\_\_\_\_ are withdrawn from consideration.

2.  Claims 7, 8, 10-12 have been cancelled.3.  Claims \_\_\_\_\_ are allowed.4.  Claims 1-6, 9 are rejected.5.  Claims \_\_\_\_\_ are objected to.6.  Claims \_\_\_\_\_ are subject to restriction or election requirement.7.  This application has been filed with informal drawings under 37 C.F.R. 1.85 which are acceptable for examination purposes.8.  Formal drawings are required in response to this Office action.9.  The corrected or substitute drawings have been received on \_\_\_\_\_. Under 37 C.F.R. 1.84 these drawings are  acceptable;  not acceptable (see explanation or Notice of Draftsman's Patent Drawing Review, PTO-948).10.  The proposed additional or substitute sheet(s) of drawings, filed on \_\_\_\_\_, has (have) been  approved by the examiner;  disapproved by the examiner (see explanation).11.  The proposed drawing correction, filed \_\_\_\_\_, has been  approved;  disapproved (see explanation).12.  Acknowledgement is made of the claim for priority under 35 U.S.C. 119. The certified copy has  been received  not been received  been filed in parent application, serial no. \_\_\_\_\_; filed on \_\_\_\_\_.13.  Since this application appears to be in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11; 453 O.G. 213.14.  Other**EXAMINER'S ACTION**

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**NEW PRIOR ART CITATION**

New prior art has come to the Examiner's attention, therefore, the following action is herein established.

**STATUTE CITATION**

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

**REJECTION OF CLAIMS OVER PRIOR ART**

**Claims 1-6 and 9** are rejected under 35 U.S.C. § 103 as being unpatentable over **Cullen** (5,426,910). Cullen's claimed invention is directed to the same claimed invention in that treatment of bagged contents is accomplished by a bag filling machine where a perforated conduit is fed through the bag filling machine as the bag is filled and deployed from the bag filling machine.

Although the conflicting claims are not identical, they are not patentably distinct from each other because (1) the method claimed by applicants is an obvious method of treating bagged contents in the operation of the patented bagging machine and (2) the apparatus claimed by applicants is an obvious simplification of the patented bagging machine. Since the claims are considered obvious method procedures used by the claimed apparatus and broadened apparatus constructions of the claimed Cullen invention, an affidavit swearing behind the reference (as

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submitted by applicants) cannot be used to overcome the reference. Specifically, it is maintained that the skilled artisan in this art would have recognized that a "pipe support" (Claim 1, last paragraph, of the Cullen (5,426,910) reference) could have been dispensed with so as to permit manual support of the pipe during its feeding and positioning within the filled bag. It is also noted herein, that this "pipe support", even though not claimed by applicant, is somewhat of an inherent provision in either the method or apparatus because "support" for the pipe would necessarily be required during the operation of the apparatus. This is the case whether the pipe is "supported" while on a reel or simply supported in its elongated form.

#### **RESPONSE TO APPLICANTS' COMMENTS**

The newly applied reference to Cullen sets forth claims directed to a bagging machine, enumerated as claims 1-4. Claim 1 is the broadest apparatus claim. No method is claimed in Cullen's (5,426,910) patent.

Applicants point to a limitation in the previously applied Cullen (5,345,744) where applicants do not attempt to claim. Applicants note that the Cullen (5,345,744) reference specify a "reel means", this "reel means" not being a part of applicants' method or apparatus claims of this application. However, the newly applied reference to Cullen (5,426,910) broadly claim this

reel means as a "pipe support" which encompasses a full gamut of supporting structure allowing the pipe to be fed into the apparatus during the filling of the bag. As noted above, it is the examiner's position that dispensing of the "pipe support" is an obvious consideration since the skilled artisan familiar with this art would have recognized the manual support of the pipe during the filling operation. Alternatively, as set out above, this "pipe support" is an inherent feature embodied by applicants' claims since the pipe is supported in some manner by the apparatus during the feeding of the pipe into the apparatus as the bag is being filled. Accordingly, Cullen's claim 1 is substantially the same as applicants' claims 1-6 and 9. Applicants' affidavit does not overcome the rejection for the following reasons because the inventions are obvious variants of one another.

As set forth in the previous Office action, an affidavit or declaration is inappropriate under 37 C.F.R. § 1.131(a) when the patent is claiming the same invention. The patent can only be overcome by establishing priority of invention through interference proceedings. See M.P.E.P. § 1101.02(g) for information on initiating interference proceedings.

Accordingly, the affidavit filed under 37 CFR 1.131 would not overcome the applicability of the newly discovered Cullen reference in this situation. Again, the test is analogous to

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that applied for double patenting; i.e., if the applicant's claims would have been subject to a double patenting rejection of the "same invention" or "obviousness" type (see MPEP § 804) if the patent and application were by the same inventive entity, then the application and patent claim are directed to the same invention. See *Aelony v. Arni*, 547 F.2d 566, 192 USPQ 486 (CCPA 1977)."

The comments set forth in the previous Office Action are applicable relative to the new Cullen reference. This position is based upon the argument that applicants are claiming an invention which is "obvious" over the claimed invention set forth by Cullen (5,426,910).

#### INQUIRIES

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner D. Crane whose telephone number is (703) 308-1870. The examiner's supervisor, Mr. J. Sipos, can be reached at (703) 308-1882.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-1148.

Documents related to the instant application may be submitted directly to Group 3200 by facsimile transmission at all

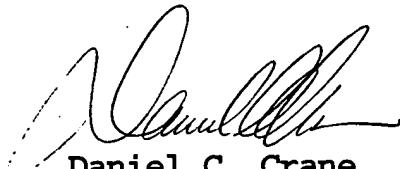
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times. Applicant(s) is(are) reminded to clearly mark any transmission as "DRAFT" if it is not to be considered as an official response. The Group 3200 Facsimile Center number is (703) 305-3579.

DCCrane (19W)  
August 30, 1995

  
Daniel C. Crane  
Primary Patent Examiner  
Group Art Unit 3201